

Anadromous Fish Agreement and Habitat Conservation Plan

Rock Island Hydroelectric Project, FERC No. 943

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**Anadromous Fish Agreement and Habitat Conservation Plan
Rock Island Hydroelectric Project, FERC No. 943**

THIS AGREEMENT for the Rock Island Hydroelectric Project (Project) is entered into between the Public Utility District No. 1 of Chelan County, Washington, (District) a Washington municipal corporation; and the United States Secretary of the Interior (DOI) through the United States Fish and Wildlife Service (USFWS), the United States Secretary of Commerce through the National Oceanic & Atmospheric Administration (NOAA) and through the National Marine Fisheries Service (NMFS), the Washington Department of Fish and Wildlife (WDFW), the Confederated Tribes and Bands of the Colville Indian Reservation (Colville), the Confederated Tribes and Bands of the Yakama Indian Nation (Yakama), the Confederated Tribes of the Umatilla Indian Reservation (Umatilla) (collectively, the Joint Fisheries Parties or the JFP); and American Rivers, Inc., a Washington D.C., nonprofit corporation; and all entities are collectively referred to as the Parties; and

INTRODUCTION

A. The site of the Project is habitat for Plan Species. Prior to this Agreement the needs of the Plan Species have been addressed through litigation and agreement. This Agreement is intended to constitute a comprehensive and long term adaptive management plan for Plan Species and their habitat as affected by the Project.

B. The objective of this Agreement is to achieve 100% No Net Impact (NNI) for each Plan Species affected by the Project on the schedule set out herein and to maintain the same for the duration of the Agreement. NNI consists of two components: (1) 91% Project Survival achieved within the geographic area of the Project by project improvement measures, including an independent standard of 95% Juvenile Dam Passage Survival; and (2) 9% compensation for Unavoidable Project Mortality provided through hatchery and tributary programs, with 7% compensation provided through hatchery programs and 2% compensation provided through tributary programs. The Parties intend these actions to contribute to the rebuilding of tributary habitat production capacity and basic productivity and numerical abundance of Plan Species.

C. The District will receive an incidental take permit for Permit Species upon this Agreement becoming effective. If the District carries out those fish protection and mitigation measures consistent with the survival standards set out in this Agreement, and provides the necessary monitoring and evaluation all according to the time frames set out for each measure, the incidental take permit shall continue for the full term of this Agreement, and the JFP shall take the actions set out in this Agreement in support of the District before the FERC and in other forums.

NOW, THEREFORE, IN CONSIDERATION of the mutual promises and conditions set forth herein, the Parties agree as follows:

SECTION I TERM OF AGREEMENT

Unless terminated early according to Section II "Termination", this Agreement shall become effective on the date this Agreement is executed by all Parties and regulatory approvals are received and shall remain in full force and effect for a period of fifty (50) years. From the date this Agreement becomes effective, it shall prospectively supersede the Rock Island Settlement Agreement dated April 24, 1987.

SECTION II TERMINATION

1. Automatic Termination Events. This Agreement shall terminate automatically: (1) at the end of the term of the Agreement as set forth in Section I "Term of Agreement", (2) in the event the FERC issues the District a non-power license for the Project, (3) in the event the FERC orders removal of the Project, or (4) in the event the FERC orders drawdown of the Project. The District's obligations under this Agreement shall terminate in the event its FERC license is terminated or transferred to another entity. The Parties agree that the terms of this Agreement shall be binding on their respective successors and assigns.

2. Elective Withdrawal Events.

a. Enough Already.

i. A Party may withdraw from this Agreement when at least fifteen (15) years has elapsed from March 1, 1998, subject to the following conditions: (1) NNI has not been achieved and maintained or (2) the Project has achieved and maintained NNI but the Plan Species are not rebuilding and the Project is a significant factor in the failure to rebuild.

ii. In the event that NNI has not been achieved and/or maintained after at least 15 years has elapsed from March 1, 1998 because the District has failed to achieve 91% Project Survival or 95% Juvenile Dam Passage Survival but the District is otherwise performing all obligations assigned to it in the Permit and this Agreement and is otherwise in full compliance with all terms and conditions of this Agreement and the Permit, NMFS and USFWS will not exercise their right to withdraw from this Agreement unless such withdrawal is explicitly to seek drawdown, dam removal, and/or non-power operations relative to the Project. Should the District and NMFS agree under these circumstances, NMFS may pursue drawdown, dam removal/ and/or non-power operations relative to the Project without withdrawal from the Agreement or suspension or revocation of the Permit. Further, if NMFS and the District are in agreement as to specific measures to remedy the District's failure to achieve or maintain 91% Project Survival and/or 95% Juvenile Dam Passage Survival, and the District promptly implements said agreed measures, NMFS will refrain from suspending or revoking the Permit.

b. Non-Compliance. A Party other than the District may elect at any time to withdraw from the Agreement based on non-compliance of the District with the provisions of the Agreement, and the District may elect at any time to withdraw from the Agreement based on non-

compliance of a Party other than the District with the provisions of the Agreement, but only subject to the following procedures: (1) a Party asserts that another Party is not complying with the terms of the Agreement, (2) the issue of non-compliance is taken to dispute resolution, Section XI, unless waived, (3) an order is entered concluding that a Party is not complying with the terms of the Agreement (remedial order), and (4) the Party found to be in non-compliance does not implement the remedial order within 15 days. Only a Party not found to be in non-compliance may exercise this withdrawal provision. In the event a complying Party chooses not to withdraw as allowed in this sub-Section, the complying Party may enforce the remedial order as set forth in Section XI "Dispute Resolution".

c. Governmental Action. A Party may elect to withdraw from this Agreement in the event that an entity with regulatory authority takes action that (1) is detrimental to the achievement of the obligations set forth in this Agreement and (2) that materially alters or is contrary to one or more terms set forth in this Agreement.

d. Impossibility. A Party may elect to withdraw from the Agreement in the event the Parties agree in writing that the obligations imposed by this Agreement are impossible to achieve.

e. Revocation of Permit. A Party may elect to withdraw from the Agreement if the NMFS revokes the Permit.

f. Withdrawal of Another Party. Except as set forth in sub-Section 2.b. "Non-Compliance", in the event a Party elects to withdraw from the Agreement such Party shall provide all other Parties with notice. Upon receipt of such notice any other Party shall have 120 days from the date of such notice to provide notice to all Parties of its intention to withdraw from this Agreement, or the right to withdraw shall be waived. The notices required under this sub-Section shall be in writing and either served in person or provided by U.S. Mail return receipt requested.

3. Conditions Precedent to Withdrawal. Two conditions must be satisfied before a Party can withdraw from the Agreement. First, the Party desiring to withdraw from the Agreement shall provide notice to all other Parties pursuant to sub-Section 2.f "Withdrawal of Another Party" of its intent to withdraw. The notice shall state the date upon which the Party's withdrawal shall become effective. The date upon which the Party's withdrawal becomes effective shall be no less than sixty (60) days from the date the notice was provided to all other Parties. Second, prior to the date upon which the Party's withdrawal becomes effective the withdrawing Party (Parties) must make itself (themselves) available for at least one policy meeting in an effort to persuade the withdrawing Party (Parties) not to withdraw. The policy meeting must take place within the 60 day period or it is waived.

4. Effect of Withdrawal. Except as set forth in Section II.5. "Effect of Termination", Sections IX.3.a and c, Section X.5. "Permit Suspension, Revocation and Re-Instatement" and Section X.6. "Early Termination Mitigation", in the event a Party withdraws from this Agreement, this Agreement places no constraints on the withdrawing Party, shall not thereafter be binding on the

withdrawing Party, and the withdrawing Party may exercise all rights and remedies that the Party would otherwise have.

5. Effect of Termination. Except as set forth in Section VII.4.f. “Account Status Upon Termination”, Sections IX.3.a and c, Section X.5. “Permit Suspension, Revocation and Re-Instatement” and Section X.6. “Early Termination Mitigation”, in the event this Agreement is terminated, voided or determined for any reason to be unenforceable, then: (1) the District shall continue to implement the last agreed to measures until the FERC orders otherwise, and (2) the Parties are not restrained in any manner from advocating to the FERC measures to replace the Agreement.

SECTION III PERFORMANCE STANDARDS AND ALLOCATION OF RESPONSIBILITY FOR NO NET IMPACT

1. 100% No Net Impact (“NNI”) shall be achieved on the schedule set out herein and maintained for the duration of the Agreement for each Plan Species affected by the Project. NNI consists of two components: (1) 91% Project Survival achieved within the geographic area of the Project by project improvement measures, including an independent standard of 95% Juvenile Dam Passage Survival; and (2) 9% compensation for Unavoidable Project Mortality provided through hatchery and tributary programs, with 7% compensation provided through hatchery programs and 2% compensation provided through tributary programs.

2. To ensure NNI is achieved and maintained, the Coordinating Committee shall: (1) oversee monitoring and evaluation, and (2) periodically adjust the Measures to address actual project survival and Unavoidable Project Mortality as provided herein; provided that no more than 9% Unavoidable Project Mortality shall be made up through hatchery and tributary compensation without concurrence of the JFP.

3. The District shall be responsible for achieving 91% Project Survival and 95% Juvenile Dam Passage Survival for each Plan Species affected by the Project through project improvement measures (including adult, juvenile, and reservoir measures). The District shall also be responsible for (1) funding the 2% Tributary Conservation Plan; (2) providing the capacity and funding for the 7% Hatchery Compensation Plan; and (3) making capacity and funding adjustments to the Hatchery Compensation Plan to reflect and fully compensate for future increases in the run size of each Plan Species. If the District is unable to achieve 91% Project Survival including achievement of 95% Juvenile Dam Passage Survival, then the District shall consult with the Parties through the Coordinating Committee to jointly seek a solution. If a solution cannot be identified to achieve the 91% and 95% standards identified herein, any Party may take action under Section II.2.d. “Impossibility”, or other provisions of this Agreement.

4. The JFP accepts the responsibility to develop plans and programs necessary to implement the Tributary Conservation Plan and the Hatchery Compensation Plan (which must include evaluation procedures) to compensate for 9% Unavoidable Project Mortality. If 9% Unavoidable Project Mortality is not compensated for through the Hatchery Compensation Plan and the Tributary

Conservation Plan, the JFP will examine additional hatchery or habitat improvements to meet the 9% obligation. If the JFP are unable to develop plans and programs to fully implement the Hatchery Compensation Plan and Tributary Conservation Plan to meet compensation levels necessary to meet NNI, then the JFP may consult with the District to jointly seek a solution.

5. Implementation of Measures to meet NNI shall follow the time frames set out in the Passage Survival Plan, the Tributary Conservation Plan and the Hatchery Compensation Plan. Where a deadline is not specified, implementation of Measures shall occur as soon as is reasonably possible.

SECTION IV PASSAGE SURVIVAL PLAN

1. Performance Standard.

a. The District shall achieve and maintain 95% Juvenile Dam Passage Survival which means that 95% of the juvenile Plan Species over 95% of each species' migration survive migration through the Forebay, Dam and Tailrace. The District shall also achieve and maintain 91% Project Survival, as required in Section III.3., which means that 91% of each Plan Species, juvenile and adult combined, survive Project effects, including delayed mortality wherever it may occur.

b. In the event turbine intake screens are installed at the Dam, spring-migrating chinook salmon (*Oncorhynchus tshawytscha*) smaller than 50 mm in length, unless otherwise agreed to by the Coordinating Committee, shall be excluded from 95% Juvenile Dam Passage Survival, but not from 91% Project Survival, for the full run of that Plan Species.

c. If a Party provides evidence to the Coordinating Committee that a significant component of a Plan Species migrates through the Forebay, Dam and Tailrace outside the usual migration period (April 1 through August 31), then the Coordinating Committee may elect to accept or verify the data and determine the significance of that component to the species. Upon agreement of the Coordinating Committee, the District shall implement Measures to increase the survival of that component of a Plan Species population. Provided, that the duty of the District under sub-Section 1(a) shall not be diminished by this sub-Section 1(c).

2. Phase I - Implementation.

a. Juvenile Dam Passage Survival Plan.

i. The District shall utilize any Tool or combination of Tools to achieve 95% Juvenile Dam Passage Survival by the end of Phase I (1998 through March 1, 2003). The ultimate decision on pursuit and implementation of Tools during Phase I is the District's. The decision process the District currently intends to utilize during Phase I is illustrated in the flowchart which is attached hereto as Exhibit A "Phase One Flowchart".

ii. Throughout Phase I, the District shall demonstrate Steady Progress through implementation of Tools leading up to at least 95% Juvenile Dam Passage Survival of Plan Species by the end of Phase I. Throughout Phase I, the District shall confer with and utilize the Coordinating Committee for review and comment on the Tools being considered or tested at the Dam.

The Coordinating Committee shall evaluate the success of the Tools on a yearly basis being implemented during Phase I. If the Coordinating Committee concludes that 95% Juvenile Dam Passage Survival will not be met by the end of Phase I, the District shall initiate parallel actions, which may include additional spill and gas abatement, to achieve 95% Juvenile Dam Passage Survival by the end of Phase I.

iii. The District shall provide the following as a minimum level of Spill throughout Phase I or until the District, pursuant to sub-Section 3 "Phase I - Measurement and Evaluation", establishes 95% Juvenile Dam Passage Survival through the use of other Tools. Subject to provisions in sub-Section 3 "Phase I - Measurement and Evaluation", spill may be adjusted or discontinued based on the relative success of other Tools.

(1) Establish a Fisheries Conservation Account ("Account"). The Account shall be credited annually on January 1st with \$2,050,000 (1986 Dollars). This dollar figure shall be adjusted annually for each year after 1986 based on the "Consumer Price Index for All Urban Consumers" published by the Bureau of Labor Statistics of the United States Department of Labor. If this index is discontinued or becomes unavailable, a comparable index which is agreeable to all parties will be substituted.

(2) The Account may be used by the Coordinating Committee for the purchase of Spill as defined in sub-Section (3.). The District shall establish and maintain control over the Account in accordance with applicable provisions of Washington State law. Any expenditure of funds or credit from the Account shall be made only upon joint written request of the JFP.

(3) So long as credit is available in the Account, spring and summer Spill will be provided by the District on a daily basis at the JFP's request. The cost of lost energy resulting from spill shall be calculated at the lowest available rate and debited against the Account. Any Party is free to review the District's accounting of the cost of Spill at any time following reasonable notice.

(4) Unused Account credit up to one-half ($\frac{1}{2}$) the amount allocated for any year may, at the option of the JFP, be carried over the following year. By mutual agreement of all Parties the Account may also accumulate a deficit of up to one-half ($\frac{1}{2}$) the annual Account credit for the year in which the deficit is incurred. Under no circumstances shall the Account balance during any year exceed one and one-half ($1\frac{1}{2}$) times the annual Account allocation for such year.

The District shall also immediately initiate evaluation of Spill efficiency and TDG abatement options. To the extent that Spill, surface gates or other spillway-type passage measures are employed at the Project to achieve 95% Juvenile Dam Passage Survival and NNI, the District shall coordinate its use of such measures with the use of such measures at upstream and downstream projects in order to address TDG levels.

b. Adult Passage Plan. The District shall emphasize adult project passage measures in order to give high priority to adult survival in the achievement of 91% Project Survival for each Plan Species. The District shall use Tools, including but not limited to the following:

i. The District shall use best efforts to maintain and operate adult passage systems at the Project according to DFOP or subsequent criteria developed through the Coordinating Committee.

ii. The District shall operate Spill and turbine units in a manner that provides for adult passage while meeting 95% Juvenile Dam Passage Survival.

iii. Areas within the adult fish passage systems which are identified by the Coordinating Committee as either consistently out of criteria or where significant delay occurs shall be modified as soon as feasible.

iv. The District shall use best efforts to eliminate identified sources of adult injury and mortality during adult migration through the Dam.

v. By the end of Phase I, the District shall identify adult fallback rates at the Dam. The Coordinating Committee shall determine the methods to protect steelhead kelts at the Dam. Reduction in fallback rates and mortalities and protection of kelts shall be factored into juvenile bypass and adult passage development and implementation and into Project operation decisions.

3. Phase I - Measurement and Evaluation.

a. At the end of Phase I, or sooner by agreement of the Coordinating Committee, testing for 95% Juvenile Dam Passage Survival or project survival for juvenile Plan Species shall be conducted in one of the following ways:

i. The Coordinating Committee may agree to measure project survival for juvenile Plan Species. If the results of such measurement indicate a high probability that 95% Juvenile Dam passage Survival has been achieved, then the Coordinating Committee may waive the requirement to measure 95% Juvenile Dam Passage Survival.

ii. If the Coordinating Committee agrees that the District has likely achieved 95% Juvenile Dam Passage Survival at the end of Phase I, the District shall measure 95% Juvenile Dam Passage Survival and shall not be required to implement additional Tools during the period of measurement and evaluation.

iii. Notwithstanding sub-Section 6 "Phase II - Interim Tools", if the Coordinating Committee cannot agree that the District has likely achieved 95% Juvenile Dam Passage Survival at the end of Phase I, the District shall measure 95% Juvenile Dam passage Survival and a Party may institute Section XI "Dispute Resolution" to address the need for additional Tools during the period of measurement and evaluation. If dispute resolution concludes by a preponderance of the evidence that 95% Juvenile Dam Passage Survival was not achieved during Phase I, then in dispute

resolution an order may be entered that implements Tools to achieve, but not exceed, 95% Juvenile Dam Passage Survival during the period of measurement and evaluation of the Tools implemented by the District during Phase I to reach 95% Juvenile Dam Passage Survival.

iv. If the Coordinating Committee agrees that the District has not likely achieved 95% Juvenile Dam Passage Survival during Phase I, measurement and evaluation shall not be conducted and the Parties shall implement sub-Section 6 "Phase II - Interim Tools" and sub-Section 7 "Phase II - Additional Tools".

b. Measurement and evaluation of 95% Juvenile Dam Passage Survival and 91% Project Survival, respectively, shall commence by the 2003 juvenile migration unless agreed to otherwise by the Coordinating Committee. Measurement and evaluation is expected to take three years to complete, unless agreed to otherwise by the Coordinating Committee.

c. The Coordinating Committee shall establish the protocol(s) to measure and evaluate 95% Juvenile Dam Passage Survival and 91% Project Survival for each Plan Species by March 1, 2001. If the Coordinating Committee has not established such protocol by said date, such protocol shall be established through dispute resolution as set forth in Section XI "Dispute Resolution" by February 28, 2003. Such protocol shall utilize the best technology and methods available. One of the methods to be considered is marked recapture.

d. Juvenile Plan Species survival shall be measured at a maximum standard error of plus or minus 5% at the ninety-five percent (95%) confidence level. Survival measurements from the three years studies shall be averaged to arrive at juvenile Plan Species survival measurements. The testing shall reflect representative environmental and operational conditions for each test, for each Plan Species and life history, as far as practicable. The testing shall also consider indirect mortality. When studies do not provide figures for components of Unavoidable Project Mortality, then the estimates of those components as set forth in Section XIII.19. "Unavoidable Project Mortality" are assumed correct. If the differences between the study results and the District's performance standard being measured are not statistically significant, then the District's performance standard has been met.

4. Phase I - 95% Juvenile Dam Passage Survival or 91% Project Survival Achieved. In the event the Coordinating Committee concludes 95% Dam Passage Survival or 91% Project Survival is achieved during Phase I, the Parties shall proceed to sub-Section 11 "Phase III - 95% Juvenile Dam Passage Survival or 91% Project Survival Achieved" for the standard that is achieved.

5. Phase I - 95% Juvenile Dam Passage Survival or 91% Project Survival NOT Achieved. In the event 95% Juvenile Dam Passage Survival or 91% Project Survival is not achieved during Phase I, the Parties shall proceed to Phase II for the standard that is not achieved.

6. Phase II - Interim Tools. If measurement and evaluation of Phase I concludes that 95% Juvenile Dam Passage Survival was not reached during Phase I, interim Tools including Trading shall be

decided upon jointly by the Coordinating Committee and implemented by the District prior to the next migration period. These Tools, which could include additional Spill, shall be selected based on technical feasibility and availability and adherence to TDG requirements.

7. Phase II - Additional Tools. The Coordinating Committee shall jointly decide on additional Tools, including Trading, for the District to implement to achieve 95% Juvenile Dam Passage Survival or 91% Project Survival using the following criteria:

- a. Likelihood of biological success;
- b. Time required to implement; and
- c. Cost-effectiveness of solutions, but only where two or more alternatives are comparable in their biological effectiveness.

8. Phase II - Measurement and Evaluation. As soon as the agreed Tools are implemented, the Coordinating Committee shall collaboratively develop and the District shall implement studies to determine if such Tools achieve 95% Juvenile Dam Passage Survival or 91% Project Survival. The studies shall utilize the best technology and methods available and be based upon the criteria set forth in sub-Section 3.d.

9. Phase II - 95% Juvenile Dam Passage Survival or 91% Project Survival Achieved. Once 95% Juvenile Dam Passage Survival or 91% Project Survival is achieved, the Parties shall proceed to sub-Section 11 “Phase III - 95% Juvenile Dam Passage Survival or 91% Project Survival Achieved” for that standard that is achieved.

10. Phase II - 95% Juvenile Dam Passage Survival or 91% Project Survival NOT Achieved. Until 95% Juvenile Dam Passage Survival and 91% Project Survival are achieved, the Parties shall continue to implement sub-Section 7 “Phase II - Additional Tools” for the standard that is not achieved, except as set forth in Sections II.2.a. “Enough Already” and II.2.d. “Impossibility”.

11. Phase III - 95% Juvenile Dam Passage Survival or 91% Project Survival Achieved. When the Coordinating Committee concludes that 95% Juvenile Dam Passage Survival or 91% Project Survival is achieved, the achieved standard shall be maintained by the District throughout the term of the Agreement. Thereafter, throughout the term of the Agreement 95% Juvenile Dam Passage Survival and 91% Project Survival shall be evaluated from time to time, as determined by the Coordinating Committee. The Coordinating Committee shall establish the measurement and evaluation protocols to be implemented by the District. The protocols shall utilize the best technology and methods available and be based upon the criteria set forth in sub-Section 3.d.

SECTION V RESERVOIR AS HABITAT

1. When making land use or related permit decisions on Project owned lands that affect reservoir habitat, the District shall consider the cumulative impact effects in order to meet the conservation objectives of the Agreement, requirements of the FERC license, and other applicable laws and regulations. The District further agrees to notify and consider comments from the Parties to the Agreement regarding any land use permit application on Project owned lands.

2. The District shall notify all applicants for District permits to use or occupy Project lands or water that such use or occupancy may result in incidental take of species listed as endangered or threatened under the ESA, requiring advance authorization from NMFS or USFWS.

SECTION VI COORDINATING COMMITTEE

1. Establishment of Committee. There shall be a Coordinating Committee composed of one (1) representative of each Party, provided, that the District's power purchasers may participate as a non-voting observer through a single representative, whom they will designate from time to time. Each representative shall have one vote. Each Party shall provide all other Parties with written notice of its designated representative to the Coordinating Committee. The Coordinating Committee shall meet whenever requested by any two (2) members following a minimum of ten (10) days written notice (unless waived). The Coordinating Committee shall act only by consensus, except as otherwise provided in Section IV.2.a. "Juvenile Dam Passage Survival Plan". The Parties shall choose and the District shall fund a neutral third party to record and distribute minutes of Coordinating Committee meetings.

2. Use of Coordinating Committee. The Coordinating Committee will be used as the primary means of consultation and coordination between the District and the JFP in connection with the conduct of studies and implementation of the Measures set forth in this Agreement and for dispute resolution. All study designs and modifications to study designs will be subject to agreement by the Coordinating Committee, except as set forth in the Passage Survival Plan. The Coordinating Committee shall not be used in connection with the Tributary Conservation Plan.

3. Studies and Reports. All studies and reports prepared under this Agreement will be available to all members of the Coordinating Committee as soon as reasonably possible. Draft reports will be circulated through the Coordinating Committee representatives for comment, and comments will either be addressed in order or made an appendix to the final report. All studies will be conducted following accepted techniques and methodologies in use for similar studies in the Columbia Basin. All studies will be based on sound biological and statistical design and analysis.

SECTION VII TRIBUTARY CONSERVATION PLAN

1. Tributary Plan. The Tributary Conservation Plan ("Tributary Plan") consists of this Agreement and Exhibit B "Tributary Compensation Plan Species Account Project Selection, Implementation, and Evaluation Plan", incorporated here by reference. The Tributary Plan is supported

by Exhibit C “Aquatic Species and Habitat Assessment: Wenatchee, Entiat, Methow, and Okanogan Rivers”.

2. Purpose. Under the Tributary Plan, the District shall provide a Plan Species Account to fund projects for the protection and restoration of Plan Species’ habitat within the Columbia River watershed (from the Chief Joseph tailrace to the Rock Island tailrace), and the Okanogan, Methow, Entiat and Wenatchee River watersheds, in order to compensate for two percent of Unavoidable Project Mortality; provided that the Parties shall not be required to actually measure whether the Tributary Plan compensates for two percent Unavoidable Project Mortality.

3. Tributary Committee.

a. Establishment of Committee. There shall be a Tributary Committee composed of one (1) representative of each Party and the Public Utility District No. 1 of Douglas County (Douglas), provided that an entity eligible to appoint a representative to the Tributary Committee is not required to appoint a representative, and further provided that, representatives from USFWS shall participate in a non-voting, ex-officio capacity unless they otherwise state in writing, and further provided that, the power purchasers may participate as a non-voting observer through a single representative, whom they will designate from time to time. The Tributary Committee may select other expert entities, such as land and water trusts/conservancy groups to serve as additional, non-voting members of the Tributary Committee. Each entity eligible to appoint a representative to the Tributary Committee shall provide all other eligible entities with written notice of its designated representative. The Tributary Committee is charged with the task of selecting projects and approving project budgets from the Plan Species Account for purposes of implementing the Tributary Plan. The Parties shall choose and the District with Douglas shall fund, independent of the Plan Species Account, a neutral third party to record and distribute minutes of Tributary Committee meetings. The District and Douglas shall administer the projects approved by the Tributary Committee.

b. Full Disclosure. After full written disclosure of any potential conflict of interest, which shall appear in the minutes of the Tributary Committee and prior to project approval, the Tributary Committee may approve a project that may benefit a person or entity related to a committee member, or an entity which appointed the committee member.

c. Meeting. The Tributary Committee shall meet not less than twice per year at times determined by the Tributary Committee. Additionally, the Tributary Committee may meet whenever requested by any two (2) members following a minimum of ten (10) days advance written notice to all members of the Tributary Committee unless a member waives notice. The notice shall contain an agenda of all matters to be addressed during the meeting.

d. Voting. The Tributary Committee shall act upon the consensus of its members that appointed a representative, except as set forth in sub-Section 4.a. “Prohibited Use of Account”.

e. Coordination With Other Conservation Plans. Whenever feasible, projects selected by the Tributary Committee shall take into consideration and be coordinated with other

conservation plans or programs. Whenever feasible, the Tributary Committee shall cost-share with other programs, seek matching funds, and “piggy-back” programs onto other habitat efforts.

4. Plan Species Account. The District shall establish a Plan Species Account in accordance with applicable provisions of Washington State law and this Agreement. Interest earned on the funds in the Plan Species Account shall remain in the Plan Species Account. The Parties to this Agreement may audit the District’s records relating to the Account during normal business hours following reasonable notice. The Tributary Committee shall select projects and approve project budgets from the Plan Species Account by joint written request of all members of the Tributary Committee. The Tributary Committee shall act in strict accordance with the following:

a. Prohibited Uses of Account. No money from the Plan Species Account shall be used to enforce compliance with this Agreement. Members of the Tributary Committee and their expenses shall not be compensated through the Plan Species Account. Administrative costs, staffing and consultants, reports and brochures, landowner assistance and public education costs collectively shall not exceed \$80,000 in 1998 dollars in any given year without the unanimous vote of the Tributary Committee.

b. Reports. At least annually, the District shall provide financial reports of Plan Species Account activity to the Tributary Committee.

c. Selection of Projects and Approval of Budgets. The Tributary Committee shall select projects and approve budgets for expenditure from the Plan Species Account for the following: (1) Any action, structure, facility, program or measure (referred to herein generally as “projects”) intended to further the purpose of the Tributary Plan for Plan Species. Projects shall be chosen based upon the guidelines set forth in Exhibit B “Tributary Compensation Plan Species Account Project Selection, Implementation, and Evaluation Plan” and Exhibit C “Aquatic Species and Habitat Assessment: Wenatchee, Entiat, Methow, and Okanogan Rivers”. Projects shall not be implemented outside the area specified in sub-Section 2 “Purpose”. High priority shall be given to the acquisition of land or interests in land such as conservation easements or water rights or interests in water such as dry year lease options; (2) Studies, implementation, monitoring, evaluation, and legal expenses associated with any project financed from the Plan Species Account; and (3) Prior approved administrative expenses associated with the Plan Species Account.

d. Ownership of Assets. Determinations regarding ownership of real and personal property purchased with funds from the Plan Species Account shall be made by the Tributary Committee. Title may be held by the District or Douglas, by a resource agency or tribe or by a land or water conservancy group, as determined by the Tributary Committee. Unless the Tributary Committee determines that there is a compelling reason for ownership by another entity, the District or Douglas shall have the right to hold title. All real property purchased shall include permanent deed restrictions to assure protection and conservation of habitat.

e. Reversion Upon Termination. Upon the Agreement's termination, the Plan Species Account, less charges authorized by the Tributary Committee, shall remain with the District, and all real and personal property which the District owns shall remain its property.

f. Account Status Upon Termination. Upon the Agreement's termination, (1) the District's unspent advance contributions to the Plan Species Account shall be promptly returned to the District, and (2) if funds remain in the Plan Species Account after the return of the District's advance contributions, then the Tributary Committee shall remain in existence and continue to operate according to the terms of this Agreement until the funds in the Plan Species Account are exhausted.

5. Funding.

a. While this Agreement remains in effect, the District shall contribute \$485,200, in 1998 dollars, annually to the Plan Species Account. By joint written request, the JFP and American Rivers, Inc.'s representatives to the Tributary Committee may elect for the District to contribute, in advance, any of the annual payments to be made during the first fifteen years of the Agreement, provided that, (1) each annual payment shall be adjusted by the District for inflation based upon a nationally recognized index, (2) the total adjusted amount shall be reduced to present value by the actual discount rate applicable to the District, and reduced by the District's actual cost of financing, and (3) each election shall be for a minimum of three annual payments.

b. The first installment is due within ninety (90) days of the effective date of the Agreement. The rest of the installments are due by the 31st day of January each year thereafter. The dollar figures shall be adjusted for inflation on the 1st day of January each year based upon the "Consumer Price Index for all Urban Consumers" for the Seattle/Tacoma area, published by the U.S. Department of Labor, Bureau of Labor Statistics. If said index is discontinued or becomes unavailable, a comparable index suitable to the Tributary Committee shall be substituted.

SECTION VIII HATCHERY COMPENSATION PLAN

1. Hatchery Committee

a. Establishment of the Committee. There shall be a Hatchery Committee composed of one (1) representative of each Party and Douglas, provided that an entity eligible to appoint a representative to the Hatchery Committee is not required to appoint a representative and further provided that the power purchasers may participate as a non-voting observer through a single representative whom they will designate from time to time. Each entity eligible to appoint a representative to the Hatchery Committee shall provide all other eligible entities with written notice of its designated representative. The Parties shall choose and the District with Douglas shall fund a neutral third party to record and distribute minutes of the Hatchery Committee meetings.

b. Meeting Notice. The Hatchery Committee shall meet whenever requested by any two (2) members following a minimum of ten (10) days advance written notice to all members of the

Hatchery Committee unless a member waives notice. The notice shall contain an agenda of all matters to be addressed during the meeting.

c. Voting. The Hatchery Committee shall act upon the consensus of its appointed members.

2. Hatchery Operations. The District or its designated agents shall operate the hatchery facilities according to the terms of the Hatchery Compensation Plan developed by the JFP pursuant to Section III.3, the Section 10 incidental take permit issued by NMFS, and in consultation with the Hatchery Committee.

3. Hatchery Production Commitments. The District shall provide the funding and capacity required of the District to meet the 7% hatchery compensation level necessary to achieve NNI. As set forth below, the initial estimated hatchery production capacities for Plan Species needed to compensate for Unavoidable Project Mortality are based on average adult returns of plan species for a baseline period, a 7% compensation requirement, and baseline adult/smolt survival rates for existing mid-Columbia River hatcheries. The rationale for determining the initial capacity requirement is supported by Exhibit D "Biological Assessment and Management Plan: Mid-Columbia Hatchery Program". The parties recognize that Exhibit D does not, by itself, create contractual obligations. The estimated initial production capacity shall be adjusted periodically to achieve and maintain NNI as required to conform with compensation required for actual Unavoidable Project Mortality, as determined from monitoring and evaluation as provided for in III.2, and IV.3 "Phase I - Measurement and Evaluation", and IV.11 "Phase III - Juvenile Dam Passage Survival or 91% Project Survival Achieved". Similarly, the production capacity, except for original inundation mitigation, shall be adjusted periodically to achieve and maintain NNI as required to adjust for changes in the average adult returns of Plan Species and for changes in the adult/smolt survival rate from the hatchery production facilities, using methodologies described in Exhibit D "Biological Assessment and Management Plan: Mid-Columbia Hatchery Program".

4. Initial Production Capacities. The Parties agree that the initial production capacities to be provided by the District for juvenile passage losses and compensation for original inundation are satisfied by maintaining current production capacities at existing facilities of 672,000 spring chinook salmon, 1,840,000 yearling summer chinook salmon, 200,000 sockeye salmon and 200,000 steelhead trout.

SECTION IX ASSURANCES

1. Regulatory Approval.

a. The Parties shall provide reasonable efforts to expedite any NEPA or SEPA process required for this Agreement to become effective. The Parties (except the lead agency) may file comments with the lead agency. Such comments will not advocate additional Measures or processes for Plan Species.

b. The Parties shall provide reasonable efforts to expedite the approval process of the District's incidental take permit application.

2. Regulatory Approval Without Change.

a. The District's obligations under this Agreement except for the District's obligations in Section X.1. "Permit Issuance" and (2) Section IX.4. "Project License", shall not take effect until the NMFS issues the District a Permit and the FERC issues the required FERC orders. Provided, the Parties shall continue to conduct planning and study efforts throughout the approval process.

b. Any Party may withdraw from this Agreement in the event that: (1) the NMFS issues the District a Permit with terms and conditions in addition to or different from those set forth in this Agreement, (2) the FERC fails to include this Agreement, in its entirety, or adds terms or conditions inconsistent with this Agreement as a license condition of the current Project license or of the first new long term Project license approved within the terms of this Agreement, or (3) a Party as a result of compliance with NEPA or SEPA requires a material change to the terms or conditions of this Agreement. Any Party may provide all Parties with notice of any event set forth within this sub-section. Upon receipt of such notice any Party may, within 60 days of receipt of such notice, provide all Parties with notice withdrawing from this Agreement. The ability of a Party to withdraw from this Agreement terminates if not exercised within said period. The notices required by this sub-Section shall be in writing and either served in person or provided by U.S. Mail, return receipt requested.

3. Release, Satisfaction and Covenant Not to Sue.

a. The Parties, within the limits of their authority, shall from the date of construction of the Project to the effective date of this Agreement, release, waive, discharge the District and the District's predecessors, commissioners, agents, representatives, employees, and signatory power purchasers from any and all claims, demands, obligations, promises, liabilities, actions, damages and causes of action of any kind concerning Plan Species except for the obligation to provide compensation for original construction impacts of the Project implemented through the hatchery component of this Agreement.

b. Provided that the District is in full compliance with its Permit, this Agreement, and its FERC project license provisions relating to Plan Species, each Party agrees not to institute any action under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 - 1544, the Federal Power Act, 16 U.S.C. §§ 791a - 828c, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668c, and the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839 - 839h against the District and its signatory Power Purchasers relating to Plan Species from the date this Agreement becomes effective through the date this Agreement terminates.

c. Termination of this Agreement or withdrawal of a Party shall have no effect upon the release provided for in sub-Section 3.a.

4. Project License. The Parties agree to join with the District's filing with FERC requesting that FERC issue appropriate orders: (1) to amend the Project's existing license to include this

Agreement as a condition thereof, and (2) to eliminate from the Project's license the Rock Island Settlement Agreement dated April 24, 1987.

5. Re-Licensing.

a. With respect to Plan Species, the Parties agree to be supportive of the District's first new long term license application to the FERC filed during the term of this Agreement, provided that the District has adhered to the terms and conditions of this Agreement, the Permit, and the FERC license provisions relating to Plan Species, as well as any future terms, conditions, and obligations agreed upon by the Parties hereto or imposed upon the District by the FERC. To the extent that the District has met such terms and conditions, the Parties agree that the District is a competent license holder with respect to its obligations to Plan Species.

b. This Agreement shall constitute the Parties terms, conditions and recommendations for Plan Species under Sections 10(a), 10(j) and 18 of the Federal Power Act, and the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668c, provided that NMFS and USFWS maintain the right to reserve their authorities under Section 18 of the Federal Power Act on the condition that such reserved authority may be exercised only in the event that this Agreement terminates, and the Permit is revoked, provided further that, the Parties as part of their terms, conditions and recommendations under Section 10(a) of the Federal Power Act may request that Plan Species protection or mitigation measures contained in a competing license application be included as a condition of the District's new long term license.

c. Notwithstanding sub-Sections 5.b. and 10 "Drawdowns/Dam Removal/Non-Power Operations", this Agreement does not limit the participation of any Party in any FERC proceeding to assert: (1) any condition for resources and other aspects of the District's license other than for Plan Species, and (2) to assert conditions for Plan Species to implement this Agreement.

6. Limitation of Reopening. During the term of this Agreement, the Parties shall not invoke or rely on any re-opener clause set forth in any FERC license applicable to the Project for the purpose of obtaining additional measures or changes in project structures or operations for Plan Species, except as set forth in sub-Sections 5.b. and c.

7. Additional Measures. This Agreement sets out certain actions, responsibilities, and duties to be carried out by the District and by the Joint Fishery Parties to satisfy the legal requirements imposed under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 - 1544, the Federal Power Act, 16 U.S.C. §§ 791a - 828c, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668c, and the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839 - 839h. This Agreement is not intended to prohibit the Parties from opposing or recommending actions in reference to (1) Project modifications such as pool raises and additional power houses, and (2) activities not related to Project operations that could adversely affect Plan Species. The Parties recognize that various of the JFP have governmental rights, duties, and responsibilities as well as possible rights of action under other statutes and regulations that are not covered by this Agreement. This Agreement does not limit or affect the ability or right of a Party to take any action under any such law or regulation.

However, the Party shall use their best efforts to exercise their rights and authority under such statutes and regulations (consistent with their duties and responsibilities under those statutes and regulations) in a manner that allows this Agreement to be fulfilled.

8. Title 77 RCW. Provided the District is in compliance with the Agreement, the Permit, and the FERC license provisions relating to Plan Species, WDFW shall not request additional protection or mitigation for Plan Species under Title 77 RCW as enacted on the effective date of the Agreement unless required to do so by subsequent amendment to Title 77 RCW.

9. Cooperation in Studies/Approval/Permits. The Parties shall cooperate with the District in conducting studies and in obtaining any approvals or permits which may be required for implementation of this Agreement.

10. Drawdowns/Dam Removal/Non-Power Operations. With respect to Plan Species under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 - 1544, the Federal Power Act, 16 U.S.C. §§ 791a - 828c, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668c, and the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839 - 839h, each Party during the term of this Agreement will not advocate for or support additional or different fish protection measures or changes in Project structures or operations other than those set forth in this Agreement. This Agreement does not include as Measures: partial or complete drawdowns, partial or complete dam removal, and partial or complete non-power operations. However, this Agreement does not preclude: spillway or Tailrace modifications; spill; structural modifications and concrete removal (holes in Dam) to accommodate bypass; structural modifications to accommodate adult passage facility improvements; and future consideration of additional Measures that may include reservoir elevation changes if all Parties agree. The Parties agree to work within this Agreement to address any issues that may arise in the future concerning Plan Species.

11. Stipulation of Plan Species. Each Party stipulates that the performance of the District's obligations under this Agreement, its Permit, and its FERC license will adequately and equitably conserve, protect, and mitigate Plan Species pursuant to the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 - 1544, the Federal Power Act, 16 U.S.C. §§ 791a - 828c, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668c, and the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839 - 839h as those Plan Species are affected by the Project through the term of the Agreement.

12. Vernita Bar. Nothing in this Agreement is intended to address the protection of Plan Species in the Hanford Reach nor the Vernita Bar Agreement, as it exists now or may be modified in the future.

13. Non-Plan Species. Non-Plan Species are not addressed in this Agreement.

SECTION X ENDANGERED SPECIES ACT COMPLIANCE

1. Scope. This Section X “Endangered Species Act Compliance” applies only between the NMFS and the District and does not apply to the other Parties unless specifically referenced.

2. Permit Issuance.

a. The District shall file with the NMFS an incidental take permit application for Permit Species pursuant to 50 CFR 222.22. This Agreement and its exhibits shall constitute the District’s habitat conservation plan in support of the District’s incidental take permit application.

b. Pending public comment and compliance with NEPA with respect to the District’s incidental take permit application and this Agreement, the NMFS finds as to each Permit Species that: (i) Any taking of a Permit Species by the District under this Agreement will be incidental to the carrying out of otherwise lawful activities; (ii) Under this Agreement the District will, to the maximum extent practicable, minimize and mitigate the impacts of such incidental take of Permit Species; (iii) The District has sufficient financial resources to adequately fund its affirmative obligations under this Agreement; (iv) As long as the measures required by this Agreement to minimize/mitigate such take are implemented, any incidental take of Permit Species will not appreciably reduce the likelihood of the survival and recovery of such species in the wild; and (v) Any other measures set forth in this Agreement as required by the NMFS as being necessary or appropriate for the purpose of the habitat conservation plan will be met.

c. After opportunity for public comment, compliance with NEPA and concurrent with the effective date of this Agreement, NMFS will issue a Permit to the District pursuant to Section 10(a)(1)(B) of the ESA to authorize any incidental take of listed Permit Species which may result from the District’s otherwise lawful operation of the Project, conducted in accordance with this Agreement and the Permit. The Permit and this Agreement shall remain in full force and effect for a period of fifty (50) years from the effective date, or until revocation of the Permit under sub-Section 5 “Permit Suspension, Revocation and Re-Instatement”, whichever occurs sooner. Amendments to the Permit or this Agreement shall remain in effect for the then-remaining term of this Agreement or until revocation under sub-Section 5 “Permit Suspension, Revocation and Re-Instatement”, whichever occurs sooner. The Permit shall incorporate by reference the no surprises rule set forth in 63 FR 8859 (February 23, 1998). This Agreement provides for changed circumstances and the mitigation measures to respond to changed circumstances. Any circumstance relating to Permit Species not addressed by this Agreement is an unforeseen circumstance.

d. The Permit shall authorize the District to incidentally take Permit Species that are listed under the ESA, to the extent that such incidental take of such species would otherwise be prohibited under Section 9 of the ESA, and its implementing regulations, or pursuant to a rule promulgated under Section 4(d) of the ESA, and to the extent that the take is incidental to the District’s lawful operation of the Project, subject to the condition that the District must fully comply with all requirements of this Agreement and the Permit. The Permit will be immediately effective upon issuance for Permit Species currently listed under the ESA. The Permit will become effective for currently unlisted Permit Species upon any future listing of such species under the ESA.

e. In the event that an additional or amended Section 10 permit is required for the implementation of any aspect of the Tributary Conservation Plan or Hatchery Compensation Plan, the NMFS shall expedite the processing of such permits or amendments.

3. Permit Monitoring. Upon issuance of the Permit, the implementation thereof, including each of the terms of this Agreement shall be monitored and evaluated as provided for in Section IV “Passage Survival Plan”. Any reports the FERC should require regarding this Agreement shall be provided to the NMFS at the time such reports are provided to the FERC.

4. Permit Modification.

a. The Permit issued to the District, shall be amended in conformance with the provisions 50 CFR 222.25 through 222.26, provided, that if said regulations are modified the modified regulations will apply only to the extent the modifications were required by subsequent action of Congress or court order, unless the Parties otherwise agree.

b. This Agreement provides for on-going, active and adaptive management activities. Adaptive management provides for on going modification of management practices to respond to new information and scientific development. Adaptive management will yield prescriptions that may vary over time. Such changes are provided for in this Agreement and do not require modification of the Agreement or amendment of the Permit, provided, that such changes will not result in a level of incidental take in excess of that otherwise allowed by this Agreement and the Permit.

5. Permit Suspension, Revocation and Re-Instatement. Except as set forth in Section II.2.a. “Enough Already”, the Permit shall be suspended, revoked and re-instated in conformance with the provisions of 50 CFR 220.31 and 50 CFR 222.27, provided, that if said regulations are modified the modified regulations will apply only to the extent the modifications were required by subsequent action of Congress or court order, unless the Parties otherwise agree.

6. Early Termination Mitigation. If the Permit is terminated early, NMFS may require the District to mitigate for any past incidental take of Permit Species that has not been sufficiently mitigated prior to the date of termination. Such mitigation may require the District to continue relevant mitigation measures of the Agreement for some or all of the period which would have been covered by the Permit. NMFS agrees that the District may invoke the dispute resolution procedures of this Agreement to pursue resolution of any disagreement concerning the necessity or amount of such additional mitigation, but if a mediation pursuant to Section XI.3.d.i, does not resolve the dispute, NMFS reserves any authority it may have under the ESA or its regulations regarding additional mitigation. So long as the District meets and continues to meet 91% Project Survival, 95% Juvenile Dam Passage Survival, its Tributary Plan funding obligations, and its Hatchery Plan funding and capacity obligations early termination mitigation shall not apply to the District.

7. Funding. In its current financial position, the District has sufficient assets to secure funding for its affirmative obligations under the Agreement. To ensure notification of any material change in the financial position of the District during the term of the Permit, the District will provide the NMFS with a copy of its annual report each year of the Permit.

8. Application of No Surprises Policy to Indian Tribes. Permit species are among tribal trust resources retained by or reserved for Indian tribes through treaties, statutes, judicial decisions and executive orders and which are protected by a fiduciary obligation on the part of the United States. The Departments of Commerce and Interior recognize that this fiduciary obligation requires, among other things, that the departments assure that actions taken by the United States under this Section X “Endangered Species Act Compliance”: (1) do not discriminate against Indian tribes and (2) do not result in Indian tribes bearing a disproportionate share of the conservation burden. The United States shall take no action under this no surprises policy that would affect the rights of Indian tribes unless such action is consistent with the requirements of the Secretarial order of June 5, 1997 and the conservation standards set out in United States v. Oregon and United States v. Washington. Nothing in this Agreement shall limit the ability of any Indian tribe Party hereto to challenge in any forum a United States action as being inconsistent with the responsibilities and standards set out in this sub-Section 8 “Application of No Surprises Policy to Indian Tribes.”

The State of Washington does not agree to or with the foregoing language. Nothing in this Agreement shall limit the ability of the State of Washington or any of its agencies to challenge, in any forum, the legal under pinnings of such language and any actions or inactions of any federal agency or official predicated thereon.

SECTION XI DISPUTE RESOLUTION

1. Scope.

a. This dispute resolution procedure (hereafter Procedure) shall apply to all disputes arising under this Agreement, including, but not limited to, those involving the Passage Survival Plan, the Hatchery Plan, the Tributary Plan and compliance with the no net impact standard and its component survival standards for the Dam, Project and Unavoidable Project Morality. Sub-Section 3.b. “Policy Committee” and 3.d. “Stage 3: Mediation” shall be available to resolve matters where the Coordinating Committee is unable to reach consensus.

b. While it is the intention of the Parties to utilize dispute resolution whenever possible, NMFS specifically reserves the right to use whatever enforcement powers and remedies are available under the ESA by law or regulation, without first resorting to this Procedure. In the event that NMFS elects to pursue an enforcement action for a violation under the ESA, the District shall be given notice and an opportunity for a hearing with respect to such violation.

c. Nothing in this Agreement is intended to nor shall it in any way abridge, limit, diminish, abrogate, adjudicate, or resolve any Indian right reserved or protected in any treaty, executive order, statute or court decree. This sub-Section 1.c. shall be deemed to modify each and every Section and sub-Section of this Agreement as if it is set out separately in each Section.

d. The Parties agree that this Agreement is not intended to create jurisdiction in any court.

e. The Party bringing an issue to dispute resolution must prove its case by a preponderance of the evidence.

2. Implementation of Settlement of Dispute. If the Procedure results in a settlement of the dispute then: (1) the Parties shall implement, consistent with the terms of the settlement, all aspects of the settlement that can lawfully be implemented without FERC approval, or the approval of another federal agency; and (2) where FERC or other federal agency approval is needed before some or all of the settlement can be implemented, all Parties shall jointly present the resolution of the dispute to FERC or the appropriate federal agency for approval.

3. Stages of Dispute Resolution.

a. Stage 1: Committee. Any matter involving compliance with this Agreement shall first be referred to the respective committee dealing with that issue. That committee shall have 20 days within which to resolve the dispute. If at the end of 20 days there is no resolution any Party may request that the dispute proceed as provided in this sub-Section 3 “Stages of Dispute Resolution”.

b. Stage 2: Policy Committee. Following the completion of Stage 1, any Party may refer the dispute to the Policy Committee. The Policy Committee shall have 30 days to convene and consider the dispute. If at the end of the 30 days there is no resolution, any Party may proceed to Stage 3 or invoke FERC jurisdiction. To implement this sub-Section 3.b. “Policy Committee”, each Party shall designate a policy representative who shall be available to participate on the Policy Committee. Any Party that fails to name a Policy Committee representative or to have its Policy Committee representative participate in the Policy Committee shall waive that Party’s right to object to the resolution of the dispute by the Policy Committee. The Policy Committee shall act by consensus and shall develop its own rules of process, provided, that the Policy Committee shall insure that all Parties are sent notice of all Policy Committee meetings.

c. Options following Stage 2. If there is no resolution of a matter following completion of Stage 1 and 2 of this Procedure, then any Party may proceed to Stage 3 or, if the matter is within the jurisdiction of the FERC, may proceed to have the dispute resolved in the FERC process or in a court of competent jurisdiction. Except for matters addressed in sub-Section 7 “Expedited Procedure”, a Party may at any time following completion of Stage 2 of this Procedure elect to waive further participation under this Procedure and proceed to have a dispute resolved in the FERC process or in a court of competent jurisdiction. Should a Party elect to invoke the FERC process or proceed to a court of competent jurisdiction, this Procedure shall be terminated.

d. Stage 3: Mediation. If a dispute is not resolved at the Policy Committee any Party may seek to have the issue mediated. The following mediation procedure shall be used:

i. Mutual Dispute Resolution.

(1) The parties shall agree on a mediator within 10 days of the date that mediation is first requested.

(2) Should the parties not be able to agree on a single mediator then the Chief Judge of the United States District Court for the Eastern District of Washington shall appoint the mediator.

(3) The cost of mediation shall be reimbursed as set out in sub-Section 6 “Funding of Mediation Proceedings”.

(4) The mediator shall control the process of mediation. However, the mediation must be completed within 30 days of the date that the mediator is selected, unless all of the parties agree to extend the time.

ii. Mediation Decision. If there is no agreement between the parties to the mediation process then the mediator shall prepare an opinion on how the dispute should be resolved. The mediator may take an additional 45 days to prepare the mediation decision unless the parties agree on a longer period. In the discretion of the mediator additional information from the parties to the mediation may be received.

e. Limitations on Mediator’s Authority. The mediator shall be without jurisdiction to consider, resolve or adjudicate federally protected Indian treaty, executive order or statutory rights. The mediator shall be without jurisdiction to include in the mediation decision any award of monetary relief for or against any party, except the mediator may include in the mediation decision: (1) that the District contribute to the fund requirements established under the Tributary Plan under this Agreement; or (2) that any Party who received funding under this Agreement return those funds upon a finding that the receiving Party, through gross negligence, failed to expend the funds as required under this Agreement. The mediator shall be without jurisdiction to include in a mediation settlement agreement or in a mediation decision any matter or requirement that relates to an issue that was not identified in the notice of mediation under sub-Section 4 “Notice of Mediation”. Should the mediation settlement agreement or mediation decision extend to an issue that was not identified in the notice, any Party may seek to void that portion of the mediation settlement agreement or mediation decision that exceeds the issues identified in the notice in a court with jurisdiction or before the FERC.

4. Notice of Mediation. Any Party that requests that an issue be resolved by mediation shall send notice in writing of such intent to all Parties to this Agreement. The notice shall state: (1) the precise issues to be resolved; (2) the Parties that have been involved or that the requesting party believes have an interest in the dispute; (3) the nature of the past efforts to resolve the dispute; and (4) the position of the requesting Party on the dispute to be resolved. Any Party may participate in the mediation by giving notice of that Party’s intention to participate to all Parties within five days of receipt of the notice.

5. Use and Binding Effect of Mediation Settlement Agreement or Decision.

a. All mediation settlement agreements shall be binding on those parties that are signatory to the mediation agreement, provided that, any part of the mediation settlement agreement that requires FERC approval shall not be implemented until approved by the FERC. The parties shall

present the mediation settlement agreement to the FERC as provided under sub-Section 2 “Implementation of Settlement of Dispute”.

b. A mediation settlement agreement may be enforced before the FERC or in a court of competent jurisdiction.

c. A mediation decision is not binding, but may be introduced as evidence in any action to resolve the dispute that resulted in the mediation decision.

d. A mediation decision holding that grounds exist to withdraw from this Agreement shall be enforceable immediately upon entry of the decision without regard to whether the decision is legally binding on all parties. Thereafter, any party may, in its discretion, withdrawal from this Agreement and pursue any right or remedy that would otherwise be available.

6. Funding of Mediation Proceedings.

a. District’s Obligation. The District shall be responsible to pay the costs of mediation (mediator and mediator’s costs) up to a maximum of \$25,000 in 1998 dollars for each proceeding. The participation fee below shall be used to offset the costs of mediation.

b. Participation Fee. Any Party that wishes to participate in mediation or be a party to a mediation agreement shall pay a participation fee of \$2,500 in 1998 dollars to participate in each proceeding. A proceeding shall include all matters included in a notice set under sub-Section 4 “Notice of Mediation” and those matters included in any response to the notice. The participation fee shall be used to pay the costs of mediation (mediator and mediator’s costs). If the costs of the mediation do not exceed the total of the participation fees paid the excess shall be returned to the parties pro rata.

c. Excess Costs. Should the costs of a mediation proceeding exceed a total of \$25,000 in 1998 dollars, then the costs thereafter shall be shared pro rata among all of the participants to the mediation, provided, if the costs of mediation exceed a total of \$25,000 in 1998 dollars any party to the mediation may at that time cause the mediation process to be terminated.

7. Expedited Procedure. Notwithstanding the procedures set out in this Section XI “Dispute Resolution”, whenever a Party seeks agreement on an issue that must be resolved within 30 days and does not involve a total estimated cost of \$325,000 in 1998 dollars, (in this sub-Section 7 “Expedited Procedure” referred to as Matter) then:

a. Any member of the Coordinating Committee shall give notice to all Parties of its intention to have the Matter finally resolved at an identified Coordinating Committee meeting. Where a Coordinating Committee member with notice of the meeting to resolve the Matter is not present or does not vote that member shall be deemed to have waived the right to vote on the Matter.

b. If after completion of the process under sub-Section 7.a., there is no consensus in the Coordinating Committee, any Party may refer the Matter to Dispute Resolution under Stage 3, by

giving notice as provided under sub-Section 4 “Notice of Mediation”. The notice shall state that the procedure set out in this sub-Section 7 “Expedited Procedure” is being invoked.

c. If notice is given under sub-Section 7.b., any Party who voted against approval of the Matter in the Coordinating Committee shall within 5 days of the notice of dispute resolution set out in writing the grounds for the Party’s failure to agree. A Party that fails to provide the written statement of reasons under this sub-Section shall waive its right to object to the resolution of the Matter under this sub-Section 7 “Expedited Procedure”.

d. The mediator shall have 15 days from the date the mediator is selected to hear and resolve the dispute.

e. A mediation decision is not binding, but may be introduced as evidence in any action to resolve the dispute that resulted in the mediation decision, provided that, the mediation decision shall be implemented immediately without regard to available appeal.

SECTION XII MISCELLANEOUS

1. Conflict Between Agreement and Exhibits. In the event of a conflict between this Agreement and an exhibit to this Agreement, this Agreement shall control and the Parties shall cause the exhibit or exhibits in conflict to be revised accordingly.

2. Amendment of Agreement. This Agreement may be amended or modified only with the written consent of the Parties, provided that, Parties who withdraw from the Agreement do not need to, and have no right to, approve any amendments or modifications, provided further, that this Agreement provides for on-going, active and adaptive management activities. Adaptive management provides for ongoing modification of management practices to respond to new information and scientific developments. Adaptive management will yield prescriptions that may vary over time. Such changes are provided for in this Agreement and do not require modification of the Agreement or amendment of the Permit, provided that such changes will not result in a level of incidental take in excess of that otherwise allowed by this Agreement or modify the provisions set out in Section III “Performance Standards and Allocation of Responsibility for No Net Impact”, further provided, that unless otherwise agreed to by the Parties NNI applies only to the identified Plan Species on the date this Agreement became effective originally.

3. Notices. Except as set forth in Section II.2.f. “Withdrawal of Another Party”, II.3. “Conditions Precedent to Withdrawal”, and IX.2.b., all written notices to be given pursuant to this Agreement shall be mailed by first-class mail, postage prepaid to each Party. Parties shall inform all Parties by written notice in the event of a change of address. Notices shall be deemed to be given three (3) days after the date of mailing.

4. Waiver of Default. Any waiver at any time by any Party hereto of any right with respect to any other Party with respect to any matter arising in connection with this Agreement shall not be considered a waiver with respect to any subsequent default or matter.

5. Integrated Agreement. All previous communications between the Parties, either verbal or written, with reference to the subject matter of this Agreement are superseded by the terms and provisions of this Agreement, and once executed, this Agreement and its exhibits shall constitute the entire agreement between the Parties, provided, that titles to sections and sub-Sections thereof are for the assistance of the reader and are not part of the Agreement.

6. Benefit and Assignment. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their successors and assigns provided, no interest, right, or obligation under this Agreement shall be transferred or assigned by any Party hereto to any other Party or to any third party without the written consent of all other Parties, except by a Party: (1) to any person or entity into which or with which the Party making the assignment or transfer is merged or consolidated or to which such Party transfers substantially all of its assets, (2) to any person or entity that wholly owns, is wholly owned by, or is wholly owned in common with, the Party making the assignment or transfer, provided that, the assignee is bound by the terms of this Agreement and applies for and receives an incidental take permit for listed Plan Species.

7. Force Majeure. For purposes of this Agreement, a “*force majeure*” is defined as causes beyond the reasonable control of, and without the fault or negligence of, the District or any entity controlled by the District, including its contractors and subcontractors, including but not limited to acts of God, or sudden actions of the elements, including fire. *Force majeure* does not include the financial inability of the District to complete the work or increased cost of performance. In the event that the District is wholly or partially prevented from performing obligations under this Agreement because of a *force majeure* event, the District shall be excused from whatever performance is affected by such *force majeure* event to the extent so affected, and such failure to perform shall not be considered a material breach, provided that nothing in this Section shall be deemed to authorize the District to violate the ESA or render the standards and objectives of this Agreement unobtainable and provided further that: (1) the suspension of performance is of no greater scope and no longer duration than is required by the *force majeure*; (2) the District shall notify the other Parties to this Agreement in writing within seven calendar days after the event. Such notice shall: identify the event causing the delay or anticipated delay; estimate the anticipated length of delay; state the measures taken or to be taken to minimize the delay; and estimate the timetable for implementation of the measures; (3) the District shall have the burden of demonstrating by a preponderance of evidence that delay is warranted by a *force majeure*. The District shall use a good faith effort to avoid and mitigate the effects of the delay and remedy its inability to perform. A *force majeure* event may require use of the adaptive management provisions of this Agreement in remedying the effects of the *force majeure* event; (4) when there is a delay in performance of a requirement under this Agreement that is attributable to a *force majeure*, the time period for performance of that requirement shall be reasonably extended as determined by the Coordinating Committee; and (5) when the District is able to resume performance of its obligation, the District shall give the other Parties written notice to that effect.

8. Appropriations. Implementation of this Agreement by the JFP is subject to the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from federal, state or tribal governments. The Parties acknowledge that the JFP will not be required under this Agreement to expend any of its appropriated funds unless and until an authorized official of that agency or government affirmatively acts to commit to such expenditures as evidenced in writing.

9. Legal Authority. Each Party to this Agreement hereby represents and acknowledges that it has legal authority to execute this Agreement and is fully bound by the terms hereof. NMFS is authorized to enter into this Agreement pursuant to the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 - 1544, the Federal Power Act, 16 U.S.C. §§ 791a - 828c, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668c, and the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839 - 839h.

10. Execution. This Agreement may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original Agreement. The date of execution shall be the date of the final Party's signature. Approval of this Agreement must be acknowledged by the Commissioner of Indian Affairs and the Secretary of the Interior, or their delegates, to the extent required by 25 U.S.C. § 81.

11. Limitations of Use of This Agreement. All Parties to this Agreement hereby stipulate that this Agreement will not be utilized against another Party in any manner whatsoever in any legal proceeding other than a legal proceeding to enforce or interpret this Agreement.

SECTION XII DEFINITIONS

Capitalized terms are defined as follows:

1. “Agreement” means this document and all its exhibits.
2. “DFOP” means the Detailed Fishway Operating Plan. DFOP is attached hereto as Exhibit F “Detailed Fishway Operating Plan” and incorporated herein by this reference.
3. “Dam” means the concrete structure impounding the Columbia River.
4. “Day” is defined by the Federal Rules of Civil Procedure.
5. “ESA” means the Endangered Species Act, 16 U.S.C. ss 1531 through 1543, as amended, and its implementing regulations.
6. “FERC” means the Federal Energy Regulatory Commission or its successor.
7. “Forebay” means the body of water represented in the drawing which is attached hereto as Exhibit G “Forebay” and incorporated herein by this reference.
8. “Measures” means any action, structure, facility, or program (on-site or off-site) intended to improve the survival of Plan Species, except those prohibited in Section IX.10. “Drawdowns/Dam Removal/Non-Power Operation”. Measures do not include fish transportation unless otherwise agreed by the Coordinating Committee.
9. “Permit” shall mean an incidental take permit issued to the District pursuant to Section 10(a)(1)(B) of the ESA to authorize any incidental take of listed species which may result from the District’s otherwise lawful operation of the Project, conducted in accordance with this Agreement.
10. “Permit Species” means as all Plan Species except coho salmon (*Oncorhynchus kisutch*). Permit Species do not include coho salmon (*O. kisutch*) since wild coho salmon are extirpated from the Mid-Columbia Region and therefore not protected by the ESA.
11. “Plan Species” means spring, summer and fall chinook salmon (*Oncorhynchus tshawytscha*), sockeye salmon (*O. nerka*), coho salmon (*O. kisutch*), and steelhead (*O. mykiss*).
12. “Project” means the Rock Island Hydroelectric Project owned and operated by the Public Utility District No. 1 of Chelan County, Washington pursuant to FERC Project Number 943. The geographic boundaries of the Project are defined in exhibit “K” of the Project’s FERC license.
13. “Spill” means the passage of water through spill gates.

14. "Steady Progress" allows increases and decreases in survival between years as long as a demonstrable upward trend exists. In order to assess steady progress, the District shall conduct interim monitoring and evaluation, such as hydro-acoustics and assessment of fish passage efficiency, as agreed to by the Coordinating Committee during Phase I (Section IV.2. "Phase I - Implementation").

15. "TDG" means total dissolved gas.

16. "Tailrace" means the body of water represented in the drawing which is attached hereto as Exhibit G "Tailrace" and incorporated herein by this reference.

17. "Tools" means any action, structure, facility or program (on-site only) at the Project, except those prohibited in Section IX.10 "Drawdowns/Dam Removal/Non-Power Operation" that are intended to improve the survival of Plan Species migrating through the Project. Tools do not include fish transportation unless otherwise agreed by the Coordinating Committee. This term is a sub-set of Measures.

18. "Trading" means the allocation of the net survival benefits in excess of 95% Juvenile Dam Passage Survival and 91% Project Survival from a downstream Dam or Project to an upstream Dam or Project, or on a stock specific basis, from an upstream Dam or Project to a downstream Dam or Project in lieu of offsite compensation measures for the affected stocks.

19. "Unavoidable Project Mortality" which is initially assumed to be 9% based on the following assumptions regarding Project impacts: juvenile dam passage mortality of 5% and a net of 4% mortality from all other project effects (including but not limited to reservoir, juvenile delayed, and adult mortality with credit for natural mortality).

IN WITNESS WHEREOF, the Parties hereto execute this Agreement as of the date last signed below.

Dated _____

PUBLIC UTILITY DISTRICT NO. 1 OF
CHELAN COUNTY, WASHINGTON

By _____
Roger A. Braden
General Manger

Address for Notice:

Public Utility District No. 1 of
Chelan County, Washington
327 N. Wenatchee Avenue
P.O. Box 1231
Wenatchee, WA 98801
Attn: General Manager

Dated _____

NATIONAL MARINE FISHERIES SERVICE,
in its own capacity and as delegate for the United
States Dept. of Commerce

By _____

William Stelle
Director, Northwest Region

Address for Notice:

Dated _____

UNITED STATES FISH AND WILDLIFE SERVICE,
in its own capacity and as delegate for the United
States Dept. of Interior

By _____

Director, Northwest Region

Address for Notice:

Dated _____

STATE OF WASHINGTON through the
Department. of Fish and Wildlife

By _____

Address for Notice:

Dated _____

CONFEDERATED TRIBES AND BANDS OF
THE COLVILLE INDIAN NATION

By _____

Address for Notice:

Dated _____

CONFEDERATED TRIBES AND BANDS OF
THE YAKAMA INDIAN NATION

By _____

Address for Notice:

Dated _____

CONFEDERATED TRIBES OF THE
UMATILLA INDIAN RESERVATION

By _____

Address for Notice:

Dated _____

AMERICAN RIVERS, INC., a Washington
D.C., nonprofit corporation

By _____

Address for Notice:

